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No. 03-44

In the Supreme Court of the United States

BASIM OMAR SABRI

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Does 18 U.S.C. § 666(a)(2) criminalize acts of bribery lacking a nexus to a federal interest, and does it exceed Congress' limited power under the Constitution?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 326 F.3d 937 (CA8 2003). The decision of the District Court is reported at 183 F. Supp. 2d 1145 (D. Minn. 2002).

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on April 7, 2003. Pet. App. A1. The Petition for Writ of Certiorari was filed on July 2, 2003, and was granted on October 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, Section 8, clause 1 of the United States Constitution provides, "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."

2. Article 1, Section 8, clause 18 of the United States Constitution provides, "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

3. The Tenth Amendment to the United States Constitution provides, "The Power not delegated

to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

4. 18 U.S.C. § 666 (2000) states:

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

* * *

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

* * *

(d)(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

STATEMENT OF THE CASE

1. Petitioner Basim Omar Sabri is a private citizen who works as a property developer and landlord in the City of Minneapolis, a local government within the State of Minnesota. Pet. App. A64. This federal criminal case arose out of a local development that Sabri proposed at Second Avenue and Lake Street within the City. *Ibid.* The development envisioned constructing a hotel and other commercial retail enterprises that would have required zoning, eminent domain/condemnation, licensing, and funding actions by the City and two local agencies. *Ibid.*

The Government indicted Sabri in August 2001 on three counts of offering a bribe in violation of 18 U.S.C. § 666(a)(2). Pet. App. A63-A66. To meet the elements of the offense, the indictment alleged (1) that Sabri on three occasions offered a bribe with the intent to influence Brian Herron, an agent of the City, in connection with the development; (2) that in 2001, the City received greater than $10,000 in federal benefits; and (3) that Sabri intended to influence Herron in connection with business of the City worth at least $5,000. *Id.*, at A64-A66.

2. In addition to the facts necessary to prove the offense under § 666(a)(2), the indictment further alleged certain background facts. In calendar year 2001, the City of Minneapolis received and administered about $28.8 million dollars of federal assistance. *Id.*, at A63. The City is governed by a mayor and a 13-member City Council, and Herron was a member of the Council. *Ibid.* His committee assignments within the Council gave him a measure of authority over Sabri's development project, including through the Ways and Means/Budget; Public Safety

and Regulatory Services; and Health and Human Services committees. *Id.*, at A64.

By virtue of his Council seat, Herron was also an officer of two local agencies with responsibilities that related to Sabri's development. *Ibid.* First, Herron was a member of the Board of Commissioners of the Minneapolis Community Development Agency (MCDA), an entity created by the Minneapolis City Council to fund housing and economic redevelopment in Minneapolis. The MCDA and its programs received approximately $23 million of federal funds in the calendar year 2001 through Community Development Block Grants and other federal programs. *Id.*, at A63. Second, Herron was a member of the Policy Board of the Minneapolis Neighborhood Revitalization Program (NRP), an entity formed by the City of Minneapolis and other local government entities to provide funding for economic revitalization in Minneapolis. *Id.*, at A64. The NRP is wholly funded by the MCDA. *Ibid.*

The indictment alleged in three counts that Sabri offered to give Herron money in exchange for official favors. Count One alleged that Sabri offered $5,000 in exchange for Herron's help in obtaining regulatory approvals from the City of Minneapolis. *Id.*, at A64-A65. Count Two alleged that Sabri offered $10,000 in exchange for Herron's attendance at a meeting and his threat to use eminent domain powers against private business owners who were unwilling to sell property to Sabri for his proposed project. *Id.*, at A65-A66. Finally, Count Three alleged that Sabri offered to give a 10 percent commission to Herron for obtaining an $800,000 community economic development grant from the City of Minneapolis, the MCDA, and other entities. *Id.*, at A66

3. Before trial, Sabri moved to dismiss the indictment on the ground that 18 U.S.C. § 666(a)(2) exceeds Congress' limited powers under the Constitution. J.A. A4. The District Court granted Sabri's motion. J.A. A7. The statute, the court determined, "does not require the government to prove a connection between the offense conduct and the expenditure of federal funds . . . ." Pet. App. A53. Without that requirement, the court held that the statute "is an unconstitutional exercise of Congress's power under the Spending Clause." *Id.*, at A61.

On the Government's appeal, a divided panel of the Court of Appeals for the Eighth Circuit reversed and reinstated the indictment. Pet. App. A29. Although it reversed, the majority agreed that "§ 666 contains no requirement that the government prove some connection between the offense conduct and federal funds beyond the express statutory requirement found in § 666(b) which requires proof that the relevant organization, government, or agency received benefits under a federal program in excess of $10,000 in any one-year period." *Id.*, at A4. The majority also agreed that § 666(a)(2) could not be sustained as an exercise of Congress' spending power, because it is "a general criminal statute which directly regulates the conduct of persons who are not parties to the funding 'contract.'" *Id.*, at A19. There was no authority, the majority found, "supporting the proposition that Congress, acting pursuant to its power to attach conditions to the receipt of federal funds, has the authority to directly regulate the conduct of third parties who are not actually the recipients of the federal funds." *Id.*, at A17-A18.

The majority nonetheless reversed the judgment of the District Court. Although the Government had expressly "disavowed reliance on the Necessary and

Proper Clause when the question first arose at oral argument," *id.*, at A36 (Bye, J., dissenting), the majority relied on that Clause, holding that § 666(a)(2) "is a legitimate exercise of Congress's undisputed power to make a law that is necessary and proper for the carrying out of its enumerated power to provide for the general welfare of the United States." *Id.*, at A-28.

Judge Bye filed a dissenting opinion rejecting the majority's argument that § 666(a)(2) is justified under the Necessary and Proper Clause. Citing this Court's decisions in *Printz* v. *United States*, 521 U.S. 898, 923-24 (1997), and *Alden* v. *Maine*, 527 U.S. 706, 732 (1999), Judge Bye maintained that § 666(a)(2) is not a "proper" exercise of federal power because it does not "he[w] to constitutional principles of limited federal government and state sovereignty." Pet. App. A33. "The development and enforcement of sound ethical standards, and of political accountability to citizens for failing to do so, lies at the very heart of sovereignty," reasoned Judge Bye. *Id.*, at A35. Section 666(a)(2) "intrudes upon state and local concerns by federalizing anticorruption law," and it therefore "offends the Constitution's basic limitations on federal power." *Id.*, at A33.

SUMMARY OF ARGUMENT

I. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991). In this federalist system, only the States possess a general police power. Section 666(a)(2) of Title 18, however, imposes federal criminal liability on wholly local conduct that has no connection to any federal interest. The ruling below, by sustaining this claimed authority, threatens to erase the "distinction between what is truly national and what is truly local."

United States v. *Morrison*, 529 U.S. 598, 617-18 (2000). The Court should reverse, for it cannot affirm without abandoning the view that the Constitution places "judicially enforceable outer limits" on federal power. *United States* v. *Lopez*, 514 U.S. 549, 566 (1995).

A. Under the Constitutional imperative of a limited federal government, the Court has carefully identified the limits on Congress' power to "provide . . .for the general welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. First, the General Welfare Clause does not grant the power to regulate, only to use federal money to persuade. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981). Second, the power to place conditions on federal spending is further limited. *South Dakota* v. *Dole*, 483 U.S. 203 (1987). The conditions must be reasonably related to the interest in the federal program. And the amount of the funds at stake must not be so great that their withholding would be equivalent to the exercise of a coercive, regulatory authority. Were it not for these limitations, the power to spend would become a general police power that would "render academic the Constitution's other grants and limits of federal authority." *New York* v. *United States*, 505 U.S. 144, 167 (1992).

B. On its face, § 666(a)(2) federalizes virtually the entire area of anti-corruption law. The statute imposes federal criminal liability for offering a bribe to influence any "agent of an organization or of a State, local or Indian tribal government" (§ 666(a)(2)) that receives "in excess of $10,000 under a Federal program" (§ 666(b)) in any continuous twelve month period surrounding the commission of the offense (§ 666(d)(5)). Within these statutory elements lie the employees of every State, of every major city and most minor ones,

and of most counties. The statute covers local police departments, the employees of hospitals and clinics, and the teachers in local schools. Moreover, because it applies to governments and organizations as a whole whenever any part of the entity receives at least $10,001 in federal funding, § 666(a)(2) imposes federal criminal liability on broad categories of wholly local conduct that involve no federal money and affect no federal program.

C. The plain language of § 666(a)(2) does not permit the judiciary to limit the statute's application to conduct that is connected to a federal interest. As the unanimous Court explained in *Salinas* v. *United States*, 522 U.S. 52, 56 (1997), the statute uses "expansive, unqualified language, both as to the bribes forbidden and the entities covered." Its text applies to "any" transaction of a sufficient value, § 666(a)(2), precluding an interpretation limiting the statute to transactions that are connected to a federal interest. The text likewise applies to all agents of "organizations" and "governments" that receive sufficient federal funding, § 666(a)(2), (b), precluding an interpretation limiting the statute to bribery involving agents who are connected to a federal program. Because the statute is unambiguous on these points, neither canons of construction nor legislative history can limit its reach.

D. Section 666(a)(2) is unconstitutional on its face because it exceeds Congress' limited authority under the spending power. First, the statute reaches beyond legitimate contractual authority to impose criminal liability on individuals who have not consented to receive any conditional federal spending. This clear violation of the limits on the spending power cannot be justified by the Federal Government's interest in protecting its own institutions, for the statute applies

indiscriminately to State and local governments. And "[s]tate governments are neither regional offices nor administrative agencies of the Federal Government." *New York*, 505 U.S., at 188. The sovereign interest in punishing corruption within state and local governments belongs to the States. The wrong done to the Federal Government is limited to "the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* the Federal Government or a third-party beneficiary . . . for the loss caused by that failure." *Barnes* v. *Gorman*, 536 U.S. 181, 189 (2002).

Section 666(a)(2) also facially violates the limits placed by *Dole* on conditional federal spending. First, the statute is unduly coercive, because it makes the entirety of a State's federal benefits turn on "consenting" to the condition. No state official could decline the billions of dollars in federal funding it would take to escape § 666(a)(2). Second, the statute is not sufficiently related to any federal interest. The Government contends that *all* corruption within state and local governments that receive federal funds affects a federal interest. But "[t]o uphold the Government's contentions . . . we would have to pile inference upon inference in a manner that would be fair to convert congressional authority . . . to a general police power of the sort retained by the States." *Lopez*, 514 U.S., at 567. Section 666(a)(2) is facially invalid because the conduct it covers does not uniformly have the requisite connection to a federal interest, and no statutory element requires the jury to find the necessary connection in each specific case.

E. The court below fundamentally misunderstood this Court's spending-power decisions when it held that § 666(a)(2) is necessary and proper to carry into execution the spending power even though it exceeds

the power itself. "The Court's broad construction of Congress' power under the . . . Spending Clause[ ] has of course been guided . . . by the Constitution's Necessary and Proper Clause." *New York*, 505 U.S., at 158-59. The limits identified in the Court's decisions are the outermost limits of Congress' combined power under both Clauses. Because § 666(a)(2) exceeds those limits, it is unconstitutional.

The Court should enforce the constitutional limits on federal power and hold that § 666(a)(2) is unconstitutional on its face.

ARGUMENT

I. Section 666(a)(2) of Title 18 Exceeds Congress' Limited Powers Under Article I of the Constitution.

"Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Section 666(a)(2) reaches directly into this sensitive area of State sovereignty to regulate wholly local conduct. The Government asserts that the statute is justified by Congress' power to spend money to "provide for the . . . general welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. "The spending power," however, "is of course not unlimited but is instead subject to several general restrictions . . . ." *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (citation omitted). And § 666(a)(2) exceeds those restrictions. The power it exercises is a general police power that the Constitution denies to the Federal Government. The Court should hold § 666(a)(2) unconstitutional on its face, because it cannot sustain the statute without

abandoning "judicially enforceable outer limits" on federal power. *United States* v. *Lopez*, 514 U.S. 549, 566 (1995).

A. The Spending Power Does Not Grant General Regulatory Power To The Federal Government.

To secure the people's liberties, the Framers created a federal system of two governments, state and federal—each accountable to the citizens, each protecting their liberty. "In th[is] tension between federal and state power lies the promise of liberty." *Gregory*, 501 U.S., at 459. To establish the federalist system, the Constitution enumerates a few fields over which Congress has complete regulatory power. And it lists one form of power—the spending power—by which Congress may act in any field. The very role of the spending power in the constitutional structure limits the authority it grants. It does not grant Congress the power to regulate directly. For if the power to spend is also the power to regulate, then Congress not only may reach every field, it may regulate every field. The one power will have become unlimited power. That is not the federal system that the Framers created, and it is not the limited power given Congress by the Constitution.

1. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S., at 457. To the Federal Government, the Constitution grants a few, enumerated powers. *See Lopez*, 514 U.S., at 552. "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 176 (1803). "The powers not delegated to the United States by the Constitution, nor prohibited

by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. As James Madison explained, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961). This federalist system "was the unique contribution of the Framers to political science and political theory." *Lopez*, 514 U.S., at 575 (Kennedy, J., concurring).

Carefully and repeatedly, the Court has defined the limits on the spending power that keep it within the authority given to the Federal Government by the Constitution. First and foremost, the Court has explained that the spending power is not a regulatory power. Rather, "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). "Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the "contract."'" *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst*, 451 U.S. at 17).

The difference between regulatory authority and contractual, spending authority is written in the constitutional structure, and it serves the Framers' ultimate purpose of limiting federal power for the protection of individual liberty. Where Congress is granted the power to regulate, that power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, 9 Wheat. (22

U.S.) 1, 196 (1824). Consequently, federal regulatory power is limited to a few, enumerated fields to preserve the limited role of the national government. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (power to "regulate commerce . . . among the several states"); *id.* at cl. 4 (power to "establish an uniform rule of naturalization"); *id.* at cls. 12-14 (power to "raise and support armies," "provide and maintain a navy," and "make rules for the government and regulation of the land and naval forces").

The spending power, in contrast, "is not limited by the direct grants of legislative power found in the Constitution." *United States* v. *Butler*, 297 U.S. 1, 66 (1936). It can potentially reach every field, because the only topical limitation on its reach is that the spending must "provide for the . . . general welfare of the United States," U.S. CONST. art. I, § 8, cl. 1, a limitation that the Court has confessed cannot readily be enforced by the judiciary, *Dole*, 483 U.S., at 207; *Helvering* v. *Davis*, 301 U.S. 619, 640-41 (1937); *United States* v. *Butler*, 297 U.S. 1, 65 (1936); *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976) *(per curiam)*.

Because the spending power can potentially reach every field, the Court has recognized that it cannot grant Congress the power to regulate. "[O]therwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *New York* v. *United States*, 505 U.S. 144, 167 (1992); *see also Davis* v. *Monroe County Bd. Of Educ.*, 526 U.S. 629, 654-55 (1999) (Kennedy, J., dissenting) ("[T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which

otherwise would lie outside its reach"); Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003). A power to regulate for "the general Welfare" could not be reconciled with the constitutional design, because "[u]nder our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace." *United States* v. *Morrison*, 529 U.S. 598, 616 (2000).

Even within its proper role of placing conditions on government spending, "[t]he spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases." *Dole*, 483 U.S., at 207 (citation omitted). First, the "exercise of the spending power must be in pursuit of 'the general welfare.'" *Id.*, at 207 (quoting *Helvering* v. *Davis*, 301 U.S. 619, 640-41 (1937)). Second, the conditions that Congress imposes must be unambiguous so that the States may "'exercise their choice knowingly, cognizant of the consequences of their participation.'" *Dole*, 483 U.S., at 207 (quoting *Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the conditions placed on the funding must be reasonably related to the interest in that program, and "if they are unrelated 'to the federal interest in particular national projects or programs,'" they may be "illegitimate." *Id.*, at 207 (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978) (plurality opinion)); *see also Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958). Fourth, the conditions cannot violate "other constitutional provisions" that "provide an independent bar" on federal action. *Dole*, 483 U.S., at 208 (citing *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985)). Finally, "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at

which 'pressure turns into compulsion.'" *Dole*, 483 U.S., at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)).

2. The limits on the spending power, as on other federal powers, are informed by the purposes for which the limits were established. The purpose of the federalist system, and its primary benefit, is to serve as "a check on abuses of government power." *Gregory*, 501 U.S., at 458. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York*, 505 U.S., at 181 (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); *see also Morrison*, 529 U.S., at 616 n. 7 ("[T]he Framers crafted the federal system of Government so that the people's rights would be secured by the division of power.").

Both power and political accountability for the criminal law belong primarily to the States, and altering that allocation threatens fundamental liberties. "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S., at 561 n. 3 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993) (quotation marks omitted)); *see also Lopez*, 514 U.S., at 583 (Kennedy, J., concurring) (criminal law is "an area to which States lay claim by right of history and expertise"). Hence, "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S., at 561 n. 3 (quoting *United States* v. *Emmons*, 410 U.S. 396, 411-12 (1973)).

The consequences of allowing the Federal Government to exceed the limits on its authority to

enact criminal statutes are severe. "The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *Lopez*, 514 U.S., at 576 (Kennedy, J., concurring). "Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.*, at 577.

B. On Its Face, § 666(a)(2) Imposes Federal Criminal Liability On Nearly The Entire Body Of Local Government Corruption.

On its face, § 666(a)(2) federalizes virtually the entire area of local corruption, regardless whether the offense conduct has any connection to federal interests. The statute provides, in relevant part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists--
>
> * * *
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.
>
> * * *
>
> (d)(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

The elements of § 666(a)(2) allow the Government to prove a violation with conduct that does not affect any federal program or federal spending. The statute plainly states that the Government must prove only two, limited connections between a bribe and the expenditure of federal funds. First, the Government must prove that the bribe was intended to influence an agent of an organization or government that received more than $10,000 in federal benefits in any twelve-month period surrounding the bribe. §§ 666(a)(2), (b), (d)(5). Second, the Government must prove that the bribe was "in connection with any business, transaction, or series of transactions" of the organization or government "involving anything of value of $5,000 or more." § 666(a)(2).

Within the scope of these two "connections" lies a vast body of entirely local conduct. The $10,000

funding requirement places no meaningful limit on the governments and organizations covered by § 666. *Every* State receives far more than the requisite $10,000 in federal benefits. *See* Office of Management and Budget, U.S. Gov't, Executive Office of the President, Historical Tables, Budget of the U.S. Gov't, Fiscal Year 2000. Every major city and most minor ones, nearly every county, and most Indian tribes also receive the minimal amount of federal benefits required to fall within § 666. Pet. App. A-33 (Bye, J., dissenting) ("it is beyond dispute that . . . nearly every county, tribe and city . . . receives that sum in yearly federal benefits"); *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, ___, 123 S.Ct. 1239, 1246 (2003) ("in 2003 local governments are commonly at the receiving end of all sorts of federal funding schemes"); George D. Brown, *The Stealth Statute–Corruption, The Spending Power and the Rise of § 666*, 73 NOTRE DAME L. REV. 247, 275 (1998). In addition, many police departments independently receive sufficient federal funding. *See United States* v. *McCormack*, 31 F. Supp. 2d 176, 178 (D. Mass. 1998). And not just governments fall within § 666, but organizations as well. Because Medicare reimbursements qualify as federal "benefits," (*Fischer* v. *United States*, 529 U.S. 667, 681 (2000)), it is almost inconceivable that any hospital or clinic falls outside § 666. Local schools also receive federal benefits, *see, e.g., Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (applying Title IX to school because it received "roughly $120,000" in federal funding), so offering bribes to principals, teachers, and school board members may now qualify as a federal criminal offense. Pet. App. A-34 (Bye, J., dissenting) ("It is now a federal crime for an auto mechanic to induce a public high school principal to hire him to teach shop class by offering free car repair."). The examples of covered governments and

organizations can be multiplied as far as federal benefits extend—and with federal domestic spending reaching 1.9 trillion dollars in 2002, federal benefits extend virtually everywhere. *See* U.S. Census Bureau, Summary of Federal Government Expenditure by State and Outlying Area: Fiscal Year 2002.

As vast as federal spending is, § 666(a)(2) is broader still, because it applies to governments and organizations as a whole. Whenever any segment of a government receives the requisite federal funding, all of the government's agents fall within the statute. Section 666(a)(2) thus criminalizes wholly local conduct. In *United States* v. *Grossi*, 143 F.3d 348, 350 (CA7 1998), for example, the court applied § 666 to bribes given by a local chiropractor to a township supervisor for disbursements from the township's general assistance program, even though that program was "funded entirely by local sources." In *United States* v. *Lipscomb*, 299 F.3d 303, 332-34 (CA5 2002), the court applied § 666 to bribery of a Dallas city council official involving taxi services, even though the city received no federal funding relevant to that field. Moreover, the statute could be applied more broadly yet. For example, the statute would allow the Government "to prosecute a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of $10,000." *United States* v. *Santopietro*, 166 F.3d 88, 93 (CA2 1999) (interpreting § 666 to require the Government to prove a nexus between federal interests and the corruption to avoid this absurd result).

C. The Plain Language Of § 666(a)(2) Cannot Be Judicially Limited To Apply Only To Conduct That Implicates A Federal Interest.

Section 666(a)(2) cannot be interpreted to contain any "nexus" element that would limit the statute to conduct that affects federal programs or federal spending. In *Salinas* v. *United States*, 522 U.S. 52 (1997), the Court held that § 666 does not require the Government to prove either that "federal funds were involved in the bribery transaction" or that "the bribe in question had any particular influence on federal funds." 522 U.S., at 60. The Court reserved the question "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." *Id.*, at 59. But the answer to that question follows directly from the text of the statute.

Section 666 plainly states the two connections the Government must prove between a bribe and the expenditure of federal funds, and there is no ambiguity in the statute that would allow the judiciary to require the Government to prove any other connection.[1] First, the Government must prove that the bribe was intended to influence an agent of an organization or government that received more than $10,000 in federal benefits in any twelve-month period surrounding the bribe. §§ 666(a)(2), (b), (d)(5). Second, the Government must prove that the bribe was "in connection with any business, transaction, or series of transactions" of the

[1] This interpretation is supported by the greater weight of the authority in the lower federal courts. *See United States* v. *Sabri*, 326 F.3d 937 (CA8 2003); *United States* v. *Edgar*, 304 F.3d 1320, 1327 (CA11 2002); *United States* v. *Lipscomb*, 299 F.3d 303 (CA5 2002); *United States* v. *Suarez*, 263 F.3d 468, 489-90 (CA6 2001); *United States* v. *Grossi*, 143 F.3d 348 (CA7 1998); *United States* v. *McCormack*, 31 F.Supp.2d 176, 186 (D. Mass. 1998).

organization or government "involving anything of value of $5,000 or more." § 666(a)(2).

As the unanimous Court explained in *Salinas*, § 666 uses "expansive, unqualified language, both as to the bribes forbidden and the entities covered." 522 U.S., at 56. With regard to the entities covered, the statute applies to every "organization, government, or agency" that "receives, in any one year period, benefits in excess of $10,000 under a Federal program." § 666(b); *see also Fischer* v. *United States*, 529 U.S. 667 (2000) (defining "benefits"). Other federal spending statutes have limited their conditions to the "program or activity" that receives the federal funding. *See, e.g., Grove City College* v. *Bell*, 465 U.S. 555 (1984) (interpreting Title IX of the Education Amendments of 1972). But § 666 does not. It refers, not to programs, but to governments, organizations, and agencies. "The difference is palpable." *United States* v. *Grossi*, 143 F.3d 348, 350 (CA7 1998) (Easterbrook, J.). Moreover, the structure of § 666 attests that Congress' choice to extend § 666 beyond federal programs was deliberate, because the statute uses the term "program" in another provision but omits it from § 666(a). *Compare* § 666(b) (requiring the $10,000 in benefits to flow from a "Federal *program*") (emphasis added). "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

The Third Circuit relied on the title of § 666, "Theft or bribery concerning programs receiving Federal funds," to conclude that the statute's text is ambiguous. *United States* v. *Zwick*, 199 F.3d 672, 682 (1999). But a

title cannot create ambiguity. Its "interpretive role" is "only [to] shed light on some ambiguous word or phrase in the statute itself." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 483 (2001) (quotation marks omitted). And § 666 is unambiguous on this point. Organizations qualify for coverage under § 666 as organizations, governments qualify as governments, and agencies as agencies. There is no textual basis for limiting § 666 to bribes connected to federally-funded programs.

Nor is there any textual basis for requiring that the transaction implicated by the bribe be connected to the federal funding that the organization receives. The statute forbids the offering of bribes "in connection with *any* business, transaction, or series of transaction of [a covered] organization . . . involving anything of value of $5,000 or more." § 666(a)(2) (emphasis added). As *Salinas* noted, "[t]he word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose [a] narrowing construction" on the statute. 522 U.S., at 57. Transactions that do not affect federal funds or federally-funded programs fall within § 666 just as plainly as those that do.

Because the breadth of § 666 is "plain to anyone reading the Act," the judiciary cannot press a limiting construction on the statute either to protect it against constitutional challenge or to preserve the balance of federal power. *Gregory* v. *Ashcroft*, 501 U.S. 452, 467 (1991). The canon of interpreting a statute to avoid constitutional question "'has no application in the absence of statutory ambiguity.'" *HUD* v. *Rucker*, 535 U.S. 125, 134 (2002) (quoting *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001)). As the Court repeated in *Salinas*, "'No rule of construction . . . requires that a penal statute be strained and distorted in order to exclude conduct

clearly intended to be within its scope . . . .'" 522 U.S., at 59 (quoting *United States* v. *Raynor*, 302 U.S. 540, 552 (1938)). To require the Government to prove some nexus between the offense conduct and federal interest—either by linking the conduct to a federal program, or by linking the transaction to federal spending—would "press statutory construction to the point of disingenuous evasion." *Salinas*, 522 U.S., at 60 (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 57 n. 9 (1996)). That is something the Court may not do "even to avoid a constitutional question." *Ibid.*

The legislative history of the statute likewise provides no basis for limiting its plain text. "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). Even if the Court were to examine the history of § 666, it does not provide the "rare and exceptional circumstances" that would justify deviating from the statute's plain language. *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991); *see also Salinas*, 522 U.S., at 57 ("'"[O]nly the most extraordinary showing of contrary intentions" in the legislative history will justify a departure from that language.'") (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)). The "chronology and the statutory language" of § 666 demonstrate that it "was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by *agencies* receiving federal funds." *Salinas*, 522 U.S., at 58-59 (emphasis added). And although the legislative history supports the inference that federally-funded programs are one object of the statute, it provides no evidence that they are the exclusive object. S. Rep. No. 225, 98th Cong., 1st Sess. 369-70, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11. This is not sufficient to prune the plain language of § 666. "[I]t is not, and cannot be, our practice to

restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself." *Brogan* v. *United States*, 522 U.S. 398, 403 (1998).

Section 666 does not require the Government to prove any connection between a bribe and federal funds beyond the two set forth in the statute. It applies indiscriminately to wholly local conduct.

D. Section 666(a)(2) Is Facially Unconstitutional, Because The Spending Power Does Not Permit Congress To Impose Criminal Liability On Individuals Who Receive No Federal Funds, And On Conduct That Affects No Federal Interest.

Congress, in enacting § 666, did not appeal to any of its enumerated regulatory powers. It invoked instead its power to spend money to "provide for the . . . general welfare of the United States." U.S. CONST. art. I, § 8, cl. 1; *see also Fischer* v. *United States*, 529 U.S. 667, 689 n. 3 (2000) (Thomas, J., dissenting) ("Section 666 was adopted pursuant to Congress' spending power"). Section 666(a)(2) exceeds Congress' limited power under the Spending Clause because it imposes federal criminal liability on third parties who have no ability to reject the federal funding that triggers the statute's coverage. It thus cannot be justified as a consensual obligation incurred upon the conditional receipt of federal spending. Section 666(a)(2) also fails the *Dole* test for appropriate conditions on federal spending. It imposes criminal liability on conduct entirely unrelated to federal spending, thus betraying it as a regulation rather than a valid condition. In addition, the statute is unduly coercive because to escape it, a State must

renounce all of its federal funding, saving only $10,000 per year.

1. Section 666 violates the most fundamental limitation on the limits of the spending power by exercising criminal regulatory authority over individuals who have not consented to receive any conditional federal funding.

Section 666(a)(2) does not place contractual restrictions on recipients of federal funding, it imposes direct, criminal liability on individual citizens. The statute's coverage is triggered by extending federal benefits to "organization[s], government[s], or agenc[ies]." § 666(b). But it places no conditions on those entities. Indeed, it does not place a "condition" on federal money at all. *Cf. Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1, 23 (1981) ("If funds cannot be terminated for a State's failure to comply with [the provision, it] can hardly be considered a 'condition' of the grant of federal funds."); compare *City of Columbus* v. *Ours Garage & Wrecker Serv.*, 536 U.S. 424, 438 (2002) (listing example of traditional condition statutes where receipt of funds is conditioned on complying with regulations); *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 278-79 (2002) (Family Educational Rights and Privacy Act of 1974, which conditioned funds on complying with provisions). The statute instead imposes direct criminal liability, and the liability falls, not on the recipients of the federal funding, but on individuals. "Whoever . . . corruptly gives, offers, or agrees to give" a bribe is liable for a federal offense. § 666(a)(2).

Section 666(a)(2) exceeds the most fundamental limitation on the spending power. It is no answer to the constitutional defect of § 666 to say that the States and local governments who received federal funding

consented to its terms. The agreement of two parties cannot impose obligations on a third party. *Firefighters* v. *Cleveland*, 478 U.S. 501, 529-30 (1986) ("[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree."). Neither may the States and local governments agree with the Federal Government to impose criminal liability on individuals.

Indeed, the Constitution itself precludes States and local governments from "contracting" away the liberties of their citizens and allowing Congress to exceed its proper role in the federal structure. "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities . . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York*, 505 U.S., at 181. Thus, "[w]here Congress exceeds its authority relative to the States . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York*, 505 U.S., at 182.

2. Section 666(a)(2) also cannot be justified by the Federal Government's interest in protecting its own institutions from corruption, because the statute applies only to State and local institutions. It is the States' interest in integrity that is affected by the local corruption that § 666(a)(2) regulates. The sovereign authority to sanction that conduct is theirs as well. The limited interest of the Federal Government in money it has already spent is to ensure that the money is properly applied, and the Court has already identified the conditional means by which the Government can protect that interest.

Petitioner does not challenge the authority of the Federal Government to protect its own institutions from corruption. Numerous statutes, both civil and criminal, directly protect the Government's interest in preserving its own institutions and property. *See, e.g.*, 18 U.S.C. § 201 (criminalizing corruption involving a "Member of Congress, Delegate, or Resident Commissioner . . . or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof"); 18 U.S.C. § 287 (criminalizing false claims made "to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof"); 18 U.S.C. § 641 (providing that "[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof" is guilty of a federal crime); 18 U.S.C. § 1001 (making it a federal crime to give a false statement "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States"); *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, ___, 123 S.Ct. 1239 (2003) (interpreting the False Claims Act, 31 U.S.C. § 3729, which applies, *inter alia*, to any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid," § 3729(a)(3)). Holding that § 666(a)(2) exceeds Congress' authority under the spending power will leave the Government's protections of its own institutions intact.[2]

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[2] The Court need not address here the constitutionality of 18 U.S.C. § 201, as interpreted in *Dixson* v. *United States*, 465 U.S. 482, 496 (1984), to apply to State and local officials who

That a sovereign may protect its own institutions is import of the Court's dictum in *Salinas* that § 666 was constitutional as applied to behavior that threatened the integrity of the federal prison programs. 522 U.S., at 60-61. The question before the Court was whether to apply the canon of interpreting a statute to avoid a constitutional question. *Id.*, at 54, 60. The Court answered that the text of § 666 was "unambiguous on the point under consideration," and therefore held that the canon could not be applied. *Id.*, at 60. That was sufficient to resolve the issue presented, but the Court also added that the application of the statute was constitutionally justified because the bribery in question had involved a federal prisoner and had threatened "the integrity and proper operation of the federal program." *Id.*, at 61. In support, the Court cited *Westfall* v. *United States*, 274 U.S. 256 (1927), which held that the Federal Government could impose criminal liability for acts that impaired "instrumentalities of the United States," such as the banks at issue there that were members of the federal reserve system. *Id.*, at 259.

The Government's legitimate interest in preserving federal institutions from corruption, however, cannot justify § 666(a)(2) on its face, because the statute is not limited to federal "instrumentalities." It applies instead to State and local governments, and it punishes local corruption that has no effect on any federal program. *Westfall*'s rationale has no application here, because the States are not mere federal

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"occup[y] a position of public trust with official federal responsibility[y]." Sabri was not indicted under § 201, and even *Dixson*'s expansive interpretation of that statute requires the Government to prove what § 666 does not—that the offense conduct affects the integrity of a federal program.

"instrumentalities." As the Court has explained, States "are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government." *New York*, 505 U.S., at 188; *see also Dixson* v. *United States*, 465 U.S. 482, 510 (1984) (O'Connor, J., dissenting) (especially when federal spending takes the form of block grants, there is "a strong presumption that state and local governments are carrying out their own policies and are acting on their own behalf, not on behalf of the United States, even when their programs are being funded by the United States"). The States are independent sovereigns, and it is their integrity—not the Federal Governments'—that is threatened by the local corruption that § 666(a)(2) claims to cover. It is for the States to vindicate their sovereignty and punish the threat against it. Every State has an anti-bribery statute for precisely that purpose, *Dixson*, 465 U.S., at 511 n. * (O'Connor, J., dissenting); 12 Am. Jur. 2d Bribery § 4 (May 2003), including Minnesota, Minn. Stat. § 609.42 (2002).

The federal interest in money that the Government has already spent is not the interest of a sovereign in protecting itself against corruption. Rather, as the Court has explained, it is the limited interest of a contracting party in ensuring that the terms of the deal are carried through—and the permissible remedies are commensurate to that interest. "When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure." *Barnes* v. *Gorman*, 536 U.S. 181, 189 (2002). The

Court has therefore held that Congress can enforce the limitations on federal spending by recovering from the States money that had been misspent. *Bennett* v. *Kentucky Dept. of Ed.*, 470 U.S. 656 (1985) (enforcing action by Secretary of Education to retake funds that State had misspent); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 603 n. 24 (1983) (opinion of White, J.) (citing *Bell* v. *New Jersey*, 461 U.S. 773 (1983) (White, J., concurring). And, Congress may authorize actions by the intended beneficiaries of the federal spending to recover the lost benefits or be compensated for injuries caused by the recipients' violation of the agreed-upon terms. *See, e.g., Davis Next Friend LaShonda D.* v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

It would perhaps be expedient for the Federal Government to have direct criminal authority under the spending power. But the Constitution "divides power among sovereigns . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S., at 187. If an enumerated regulatory power reaches State and local corruption, Congress may of course exercise it. Indeed, in response to the Court's decision in *McNally v. United States*, 483 U.S. 350, 355 (1987), Congress amended the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, to apply to "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346; *see Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000) (statute amended in response to *McNally*). The Court has never held, however, that Congress may pass criminal statutes under the authority of the spending power, and it cannot sustain § 666(a)(2) without

abandoning the fundamental limit on the General Welfare Clause that prevents that Clause from overrunning all enumerated limits on federal authority.

3. Even if it exercised only contractual, spending power authority, § 666(a)(2) would still be facially unconstitutional, because it exceeds the two primary restrictions on that power announced in the Court's decision in *South Dakota* v. *Dole*. First, the statute is unduly coercive, because it makes the entirety of a State's federal benefits turn on "consenting" to federal criminal jurisdiction. The financial inducement in *Dole* was inconsequential by comparison to the benefits at stake under § 666. There, a State declining to accept the condition would lose only "5% of the funds otherwise obtainable under specified highway grant programs." 483 U.S., at 211. Under § 666, a State must decline 100% of its federal benefits (save for $10,000), not 5%, and for every federal program, not just a handful. No State could turn down all of its federal benefits in this fashion. In 1999, Minnesota state and local governments would have been required to surrender $4.496 billion in federal aid to resist federal regulation of local corruption. *See* Bureau of the Census, U.S. Dep't of Commerce, State and Local Governments--Revenue by State for Fiscal Year 1999. California governments would have had to surrender $35.955 billion; Arizona governments, $3.952 billion. *Ibid.* North Dakota's surrender, at $1.018 billion, ranks near the bottom in total dollars—but that sum comprised 25% of North Dakota's total state budget for the year. *Id.* If there is to be any limit on the coerciveness of the financial inducement that Congress may impose, then placing the entirety of a State's federal benefits at issue must fail it. Section 666 is unduly coercive, or no statute is.

Second, § 666 also fails the requirement that the "condition" must be related to the purpose of the federal program. This case, like *Dole*, does not require the Court to "define the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power," 483 U.S., at 209 n. 3—but for the opposite reason. In *Dole*, the condition fell within the limitation, wherever it might ultimately be drawn. Here, § 666 falls outside it, because it imposes criminal liability on conduct that has no effect on any federal program or any federal spending. A federal grant to any single program of a State government qualifies the government as a whole for coverage under § 666. *See supra*, at 19. For example, § 666 would apply to a bribe offered on December 31 to an agent of the city parks department, even if the only federal benefits the city received were on the preceding January 1 for its highway program. This is not a "reasonable condition[ ] relevant to federal interest in the project and to the over-all objectives thereof." *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958). The relatedness requirement is intended to ensure that "the Spending Clause [is] not simply a device to obtain federal jurisdiction," *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 291 (2002) (Breyer, J., concurring in the judgment). Here, the federal spending serves only that purpose.

The Government contends that the Court may uphold § 666 because corruption anywhere within a State government affects the integrity of that government and hence the integrity of the specific federally-funded programs. This is "a view of causation that would obliterate the distinction between what is national and what is local . . . ." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring). And it is a view the Court

has rejected. *Lopez*, 514 U.S., at 566-67; *Morrison*, 529 U.S., at 616 n. 6 ("We are not the first to recognize that the but-for causal chain must have its limits . . . ."). The Government's argument here, analogous to the argument it made in *Lopez* and *Morrison*, is that the Court may determine that *every* act of attempted bribery involving a transaction of at least $5,000 and an agent of an entity receiving more than $10,000 in federal funding sufficiently affects federal interests within the Spending Clause. *Cf. Lopez*, 514 U.S., at 563 ("The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce.") And as in *Lopez*, "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under [one enumerated clause] to a general police power of the sort retained by the States." *Id.*, at 567. To uphold § 666 would require the Court "to conclude . . . that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do." *Id.*, at 567-68 (citation omitted).

Section 666 is facially invalid because the conduct it covers does not uniformly have the requisite connection to federal spending, and no element within the offense requires the jury to find the necessary connection in each specific case. When a statute has reached beyond Congress' authority, the Court, "[i]n various settings, [has] interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope." *Ring* v. *Arizona*, 536 U.S. 584, 606 (2002) (citing *Lopez*, 514 U.S., at 561-62; *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) *(per curiam)*; *Lambert* v. *California*, 355

U.S. 225, 229 (1957)). The Court in *Lopez*, for example, did not doubt that within the possessions of firearms covered by § 922(q) there was some "discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562. Yet because the statute did not require the jury to find that connection or effect, the Court held the statute facially unconstitutional. The Court in *Morrison* also acknowledged subcategories of gender-motivated violence that were "directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce." 529 U.S., at 609, 613 n. 5. Yet because Congress did not require the plaintiff to prove those connections as an element of the crime and "elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime," *id.*, at 613, the Court "agree[d] that . . . the proper inquiry" was whether "gender-motivated violence wherever it occurs" had a substantial effect on interstate commerce. *Id.*, at 609. Finding that it did not, the Court struck the statute down on its face. *Id.*, at 617.

In the analogous context of a facial challenge to agency regulations, Justice Scalia has explained why a law cannot be justified by the fact that it has been drafted so broadly as to encompass some conduct that the regulator could lawfully regulate:

> It is one thing to say that a facial challenge to a regulation that omits statutory element x must be rejected if there is any set of facts on which the statute does not require x. It is something quite different—and unlike any doctrine of "facial challenge" I have ever encountered—to say that the challenge must be rejected if the regulation could be applied to a state of

> facts in which element x happens to be present. On this analysis, the only regulation susceptible to facial attack is one that not only is invalid in all its applications, but also does not sweep up any person who could have been held liable under a proper application of the statute. That is not the law.

Babbitt v. *Sweet Home Chapter of Comty. for a Great Ore.*, 515 U.S. 687, 731-32 (1995) (Scalia, J., dissenting). The same analysis is true of facial constitutional challenges to a statute. It would be one thing to say that a facial challenge to a spending power statute should fail if there were situations in which the General Welfare Clause did not require the statute to be related to the federal interest in its spending program. It is altogether different—and simply incorrect—to say that a challenge should fail simply because the statute is so broad that it covers some conduct that Congress could regulate. Section 666(a)(2) sweeps in local corruption generally, and no element requires the jury to find the requisite federal connection. The statute is defective on its face, because it never requires the jury to find an element that the Constitution always requires.

"The Constitution requires a distinction between what is truly national and what is truly local," *Morrison*, 529 U.S., at 617-18, and the Court has "'*always* . . . rejected readings of . . . the scope of federal power that would permit Congress to exercise a police power.'" *Id.*, at 618-19 (quoting *Lopez*, 514 U.S., at 584-85 (Thomas, J., concurring). Section 666(a)(2) is an exercise of a police power that Congress was not given.

4. The consequences of § 666(a)(2)'s unauthorized expansion of federal power are severe, because the

statute eliminates the ability of citizens to hold a single sovereign accountable for the failures and excesses in local criminal enforcement.

Perhaps more than any other type of federal regulation, federal criminal statutes blur local and federal political accountability. As a general rule, they do not preempt state criminal regulations. *See Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); Pet. App. A35 (Bye, J., dissenting) ("I recognize, of course, § 666(a)(2) does not preempt state or local power to punish corruption."). Hence, they do not leave any single sovereign accountable for exercising authority. Both sovereigns *can* act, but neither is *required* to act. Each government can blame any failure on the other, leaving neither the State nor the Federal Government accountable to the people. When the Government interposes federal criminal regulation in an "area[ ] of traditional state concern," it therefore blurs "the boundaries between the spheres of federal and state authority" and makes "political responsibility . . . illusory." *Lopez*, 514 U.S., at 577 (Kennedy, J., concurring).

Moreover, when federal criminal regulation is tied to federal spending, "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests." *New York*, 505 U.S., at 182. On the one hand, because the federal criminal regulation will not require the States to relinquish their own regulatory authority, they have little to lose in "consenting" to the federal infringement. And on the other hand, States have a significant amount to gain by accepting. By accepting,

the States continue to receive and control the disbursement of federal funding, from which they garner significant political benefits. Paradoxically, the political protection of individual liberty is thus weakest precisely where the threat to that liberty—from direct criminal sanctions—is greatest.

Even more clearly than the gun-control statute at issue in *Lopez*, section 666(a)(2) "upsets the federal balance to a degree that renders it an unconstitutional assertion" of federal power. *Id.*, at 580 (Kennedy, J., concurring). To deny the federal incursion, States and local governments would be required to renounce all federal funding save for an insignificant $10,000. In every State, this would amount to billions of dollars. *See supra*, at 19, 31. The deal that § 666(a)(2) offers is thus a dismayingly easy one for the States to accept. At a gain of billions of dollars in federal largesse that they can distribute to political advantage, the States consent to concurrent federal criminal regulation, while retaining their own criminal anti-corruption statutes. The only loss is to the citizens, who lose the ability to hold a single sovereign—and a local one—accountable for both failures and excesses in enforcement against local corruption. Congress does not possess the authority to enact such a sweeping federal, criminal law, and § 666(a)(2) therefore violates the Tenth Amendment. *See New York*, 505 U.S., at 156.

E. The Necessary and Proper Clause Does Not Provide The Authority That Congress Lacks Under The Spending Power To Enact § 666(a)(2).

Although the Government "disavowed reliance on the Necessary and Proper Clause," Pet. App. A36, the court below rested its decision sustaining § 666(a)(2) wholly on that Clause. Invoking "the last, best hope of

those who defend ultra vires congressional action," *Printz* v. *United States*, 521 U.S. 898, 923 (1997), the court held that although § 666(a)(2) exceeds Congress' authority under the Spending Clause, it falls within Congress' power "to make all laws which shall be necessary and proper for carrying into execution" the spending power, U.S. CONST. art. I, § 8, cl. 18.

The Eighth Circuit's holding rests on a fundamental misunderstanding of this Court's decisions addressing the Spending Clause. The whole object of those decisions has been to discern which laws are necessary and proper for implementing the spending power. The distinction that the court of appeals drew between a spending power analysis and a necessary and proper analysis of a statute enacted under the spending power is wholly of its own making, and wholly artificial. Section 666(a)(2) is not a proper law for carrying into execution the spending power because it exceeds the constitutional limits on that power.

1. An analysis under the Necessary and Proper Clause is not foreign to the Court's decisions implementing the spending power, but an integral part of them. The Court has long recognized that the Necessary and Proper Clause applies to the spending power. *Buckley* v. *Valeo*, 424 U.S. 1, 90 (1976) *(per curiam)*. Both implicitly and explicitly, the Court has incorporated an analysis under that Clause into its decisions setting the limits on federal authority under the Spending Clause. When the Court catalogued the restrictions on the spending power in *Dole*, it implicitly acknowledged the role of the Necessary and Proper Clause. The Court analyzed whether "the means [Congress] chose" in the statute at issue "were reasonably calculated to advance the general welfare" and thus implement the spending power. 483 U.S., at 208. In *New York*, the Court made express what had

been implicit in *Dole*: "The Court's broad construction of Congress' power under the . . . Spending Clause[ ] has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause." 505 U.S., at 158-59 (citing *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 411-21 (1819)). The restrictions announced in the Court's spending power cases thus state the outermost limit of Congress' authority.

Those restrictions, moreover, follow directly from the classic statement of Chief Justice Marshall regarding the scope of the Necessary and Proper Clause. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 4 Wheat., at 421 (1819). As applied to enumerated powers that designate permissible federal fields of regulation without limiting Congress' means for addressing them, *McCulloch* alone sufficiently describes the appropriate scope of federal power. But in the General Welfare Clause, the Constitution defines, not just the permissible ends, but also the permissible means of federal power. Hence, only the means that the Clause allows "consist with the letter and spirit of the constitution," and only those means are "appropriate." *Ibid.*; *see* David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1, 5-24 (1994). If the spending power were not so limited, of course, it "could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S., at 167.

The Court's decisions identify the outermost limits of the spending power as implemented through the Necessary and Proper Clause. Section 666(a)(2)

exceeds those limits. *See supra* at 24-37. It is therefore an unconstitutional exercise of federal power.

2. In addition, the sovereignty of the States places an independent limit on Congress' authority under the Necessary and Proper Clause. *Alden* v. *Maine*, 527 U.S. 706, 732 (1999) (the Necessary and Proper Clause does not give Congress the authority to override a State's sovereign immunity to suit in its own courts). In *Printz*, the dissent contended that the Necessary and Proper Clause, in conjunction with the Commerce Clause, gave Congress the power to compel state officials to implement provisions of the federal Brady Act. 521 U.S., at 941. But the Court rejected that position, holding that laws that infringe state sovereignty are not "proper" for carrying into execution an enumerated power. *Id.*, at 923-24. "When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a 'Law . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'" *Printz*, 521 U.S., at 923-24 (quoting The Federalist No. 33, at 204 (A. Hamilton)).

Section 666(a)(2) interjects federal regulation into an area of traditional state authority, *see United States* v. *Bass*, 404 U.S. 336, 349 (1971), blurring the political accountability of both state and federal officials, and upsetting the federal balance to a degree that renders it unconstitutional. *See supra* at 11-16. The Court should enforce the constitutional limits on federal power and hold that § 666(a)(2) is unconstitutional on its face.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the Eighth Circuit Court of Appeals and hold that 18 U.S.C. § 666(a)(2) is unconstitutional on its face.

Respectfully submitted,

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